Supreme Court, U. S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1980

NO.

79-1289

WILLIAM M. CHANEY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner William M. Chaney prays that a Writ of Certiorari issue to review the opinion and judgement rendered in these proceedings on the 10th day of December, 1979 see Appendix A.

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United States v. Martinez 55 F 2d 1277, 1977.

United State v. Mahone 537 F 2d 22, (7th Cir 1976)

Gordon v. United States 127 U.S. App. D.C. 343, 383 F 2d 936, 940 (1967).

Karikas v. United States, 111 U. S. App. D. C. 312, 316 296 F 2d 434, 438 (1961).

Hallivan v. United States 182 F 2d 880, 885, Cert. den. 341 U.S. 952, 71 S. Ct. 1010, 95 L. Ed 1375.

Hampton v. United States 269 A 2d 441, 93 ALR 2d 951.

United States v. Conti. 361 F 2d 153 1966,(2nd Cir.)

United States v. Perez 22 United States (9 Wheat) 291 (1824).

OPINIONS BELOW

The order of the Court of Appeals for the Seventh Circuit Appears as Appendix A pages A1-A2.

The order of the District Court for the Southern District of Indiana appears as Appendix B, pages A3-A8.

Part of the District Court's Ruling on admissibility of defendant's prior conviction into evidence is shown as Appendix C pages A9-A12 and appears in full at pages 807 through 835 Vol. VI Transcript of Record.

The Districts Court's order sentencing defendant appears as Appendix D, pages A13-A16 and at pages 1688 through 1734, Vol. XII Appendix C of the Transcript of Proceedings.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered December 10, 1973.

Petitioner petition for rehearing and

suggestion that rehearing be en banc was denied January 22, 1980. Jurisdiction of this Court is envoked under the constitution of the United States and under 18 U.S.C.A., Sec. 3772.

QUESTIONS PRESENTED

1. After two trials by jury and two remands by the Circuit Court of Appeals for errors of the Court and district attorney, and after a third trial in which the jury was out some fifty hours and was finally dismissed without reaching a verdict, was the defendant's contitutional right to due process of law violated when the trial court overruled his motion for dismissal and thereby forced defendant to submit to a fourth trial by jury for the same offense.

2. Under rule 609 of the Federal Rules of Evidence may a defendant who has not offered character witnesses and who takes the witness stand in his own behalf, be cross examined as to his prior convictions, where such convictions

are not probative of his credibility and were allowed in evidence to show that the defendant was not 'lily white' and was 'a prior convicted felon-a crimminal'.

3. Defendant was Grand Dragon of the Klu Klux Klan for the State of Indiana. Upon his original conviction on a three count indictment defendant was given a sentence of two years plus 18 months probation. On appeal one count of the three count indictment was dismissed and the case remanded. Upon defendant's 1st retrial after this first remand defendant was given a sentence of three years plus three years probation. After a second remand, upon defendant's fourth trial for the same offense after the third trial had ended in a hung jury defendant was sentenced to 5 years confinement plus five years probation.

Did these increased sentences after each remand and retrial violate due process of law and misapply this court's holding in North Carolina v Pearce (1969), 355 U.S. 711; 89A S.

Ct. 2072; 23 L. Ed 2d 656.

4. Where defendant was charged as a principal, where the government theory of the case was that defendant was the principal and only perpetrator of the charged offense, where there was no evidence presented as to another participant in the offense nor of the defendant's aiding and abetting anyone, may the trial court properly give an instruction charging the jury that it may find the defendant guilty if it found he aided and abetted the commission of the crime, merely because the defense counsel in his closing argument pointed out to the jury that persons other than defendant had a better motive to commit the crime or merely because the evidence was in the Court's opinion so strong against defendant that the jury could find that if defendant did not actually commit the offense he must have helped someone unnamed, unmentioned and as far as the evidence showed uninvolved commit the crime.

5. Does a defendant in a criminal cause

have the right to defer his opening statement and make it just prior to the commencement of his evidence.

6. Does retrial after a mistrial declared when the trial judge dismissed the jury after it had deliberated some 50 hours without reaching a verdict violate the constitutional prohibition against double jeopardy.

ARTICLES OF CONSTITUTION AND RULES INVOLVED

This case involves:

The 5th Amendment to the Constitution of the United States which provides;

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the 14th Amendment of the Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Evidence No. 609 (a) (1)

which provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.

STATEMENT OF THE CASE

Defendant, Grand Dragon of the Klu Klux Klan for the State of Indiana was indicted by a federal grand jury on a four count indictment. Prior to trial the original district judge dismissed one count of the indictment and on appeal the

cause was remanded for retrial because of an improper Allen type instruction given by the district judge. Defendant's 2nd trial by jury was on the remaining two counts of the indictment charging an attempt to damage a building used in interstate commerce and possession of an unregistered firearm. He was again convicted and this time sentenced to three years confinement and three years probation. Once again on Appeal the Court of Appeals remanded the cause for retrial saying the lower court committed error by refusing to permit two expert witnesses offered by defendant to testify. The jury upon defendants third trial for the same offense deliberated some 50 hours without reaching a verdict and was finally dismissed by the trial judge. Defendant then filed a motion to dismiss the indictment based upon the theory that it would be a violation of due process of law and would place defendant in double jeopardy to force defendant to undergo a fourth trial for the same offense. This motion was overruled

and defendant was tried by jury a fourth time for the same offense. Prosecution evidence was that at 5:00 A.M. on May 10, 1976, a fire bomb of the molotov cocktail type was thrown against the rear door of the Naegele Outdoor Advertising Co., Inc. in Indianapolis. Two truck drivers from an elevated ramp across the street saw the fire. Both saw a car pull into the Naegele driveway. One saw a man leave the car and throw two fire bombs. A few seconds later, a Marion County Sheriff passed the scene. He saw a man running from the scene to a car in the driveway, get into the car and drive away. He stopped the car a short distance away from the scene and arrested defendant, the only occupant of the car. Both defendant and his car smelled of gasoline. Defendant-appellant's testimony was to the effect that on the day before the incident he had worked in his yard using gasoline to run his mower, to set a brush fire, to plow his garden and to mow the yard of a friend. Defendant-appellant's wife testified that she had

purchased gasoline for his use that morning and had spilled some in the car. She soaked it up with a towel and left the towel in the car. The defendant-appellant and his brother spent the early evening and all night drinking and bar-hopping and finally both had fallen asleep in defendant-appellant's car. They awakened early in the morning of the 10th and were proceeding to defendant's home for breakfast, defendant in his car and his brother following. The route to defendant-appellant's home took them by the scene of the fire and as they passed the scene, defendant-appellant was stopped by Marion County deputy. Some employees of the Naegele Company went on strike on May 9th and picketed the company. The company had received two threatening telephone calls on the first day of the strike, the day before the fire bombing - one threatening a bombing at six o'clock and one threatening to beat the person answering the telephone. Naegele had brought in supervisory employees from out-of-state to man the job of striking em-

ployees. Some tires had been slashed on Naegele's trucks and paint splashed on Naegele's signs.

At the commencement of trial after the jury was sworn, the prosecutor made his opening statement. Defendants attorney requested the right to defer his opening statement until just prior to presentation of defendant's evidence. The court denied this request saying;

"If you conduct an opening statement it must be done at this stage of the trial."

Again at the close of the governments case and before commencing to put on defendants evidence defendant again requested permission to make his opening statement. This was denied.

At the close of the all evidence the court gave its instructions to the jury, including an instruction on aiding and abetting, to which defendant objected. The jury after deliberating some 25 hours returned a verdict of guilty. On appeal this was affirmed and motion for rehearing

denied.

ARGUMENT
I

DUE PROCESS AS APPLIED TO REPEATED TRIALS AFTER REMAND AND AS APPLIED TO DEFENDANT FOURTH TRIAL FOR THE SAME OFFENSE.

This Court has on occassion stated that a retrial after a remand is permissible. This is permissible because such retrial after remand has been held not to constitute double jeopardy. Therefore, the double jeopardy prohibition of the constitution does not apply. However, the defendant can find no cases in which this Court has address the question as to how many retrials after remands and hung juries may a defendant be submitted to before such retrials deny to a defendant that due process of law quaranteed by the 14th Amendment to the Constitution.

This Court has defined the denial of due process in a criminal trial as 'the failure to observe that fundamental fairness essential to

the very concept of justice'.[1] In Green v. United States 355 U.S. 184, 187, 188; 2 L. Ed. 2d. 99, 73 S. Ct. 221 this court set forth the "underlying idea" behind the Fifth Amendment double jeopardy prohibition as:

> "The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense whereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."

The rationale behind such finding seems to be that it would be grossly unjust and unfair to permit the awsome power of the state to be yielded against a criminal defendant in repeated attempts to convict him of a specified charge, that it would be unjust

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1 Lisenba v. Calif., 314 U.S. 219; 86 L. Ed. 166; 62 S. Ct. 280 reh. den. 315 U.S. 826, 86 L. Ed 2d 1222, 62 S. Ct. 620. (1941).

and unfair to subject him to the continued embarrassment expense and ordeal of repeated trials and prolong the agony and turmoil of his insecure life while awaiting repeated trials.

Defendant recognizes, of course, that this statement was made in reference to the double jeopardy prohibition. However, merely because the strict doctrine of double jeopardy does not apply, and merely because some technicality prevents the application of the double jeopardy prohibition, such technicality does not remove from a defendant the unjust and unfair burden and agony of repeated trials for the same offense and it would seem apparent that repeated trials after remands and hung jury would at some point reach that limit of unfairness and unjustness prohibited by the due process clause. Permitting four retrials for the same offense, where such retrials were brought on not by defendant's action but through the errors of the judge and the district attorney shocks that sense of justice

and fairness so essential to due process of law. To give the government with its awsome power four chances to fairly convict the defendant destroys the underlying idea expressed in the Green Case just as much as it would have had the technical concept of double jeopardy been present. Where a defendant has three times suffered the agony of a trial by jury for the same offense and has long lived in an atmosphere of anxiety and insecurity the fundamental principle of fairness and justice demands that he not suffer the ordeal of a fourth trial. How much suffering can the state subject a defendant to - how much agony must a defendant endure to fight the awsome power of the state. In the absence of the very technical concept of double jeopardy how many retrials after remands caused by governmental and judicial error must a defendant endure. Can anyone doubt that ten or fifteen of such retrials would be too many. Where then does the right of the state to exact its pound of flesh end. When does such right become

unjust and unfair. Defendant submits that fundamental justice - that universal sense of fair play dictates that four trials by jury for the same offense are too many - is unjust, unfair, and violative of defendant's right to due process of law. Defendant wonders, had he not have been a high state official in the Klan would the government had pursued him through four trials by jury, particularly after the third of such trials ended in a hung jury.

II

ADMITTING INTO EVIDENCE
DEFENDANT'S PRIOR CONVICTIONS

Proof that the finding of the district judge that defendant's prior felonies could be admitted into evidence as probative of defendants veracity was just a bare pronouncement of the required words is shown at page 910 of Appendix C, being pages 824 and 825 of the Transcript of Record. At this point in an in-trial hearing out of the presence of the jury the court recessed the proceedings so that the district attorney

could "check the Michigan statutes there, as to the ones involved in the crime that was committed here, these two crimes, to see what that statute's penalty provided. I refer especially to what the actual sentence might have been. If its a felony, in excess of one year the statute that proscribes it provides that penalty, then it is such a crime that would be within the 10 years". After this recess, the district attorney reported that "the charges were criminal number 3248 Michigan Statutes Annotated 28-421, Possession of a Gas-ejecting device, five years or $2,500.00 or both. Criminal number 3249. Carrying a concealed weapon in a motor vehicle, Michigan Statute annotated 28.424, five years $2,500.00 or both". The Court then said without hearing more and without any evidence as to how these conviction were probative of defendants credibility:

> "Now the Court would find that that that is probative evidence of the credibility of the witness and is admissible..."

When pressed by defendant's counsel as to how

such convictions were probative of credibility the court said:

> "Credibility of this witness. He's a convicted felon, a criminal"

(page 11 Appendix D, and page 826 Transcript of Record lines 7 and 8).

Later in said in-trial hearing the Court said:

> "The Court further finds that the probative value of the evidence and value to the trier of the fact is greater than that of any prejudice that might result to the defendant from such being elicited in the record by crossexamination of the defendant. The defendant has taken a steadfast position that he's an honorable man, truthful and honest, and went into great detail of all of the achievements in life, all of the organizations he belongs to. He's built up his credibility to such an extent that it seems a shame that anybody would ever want to accuse him of being incredible about his testimony. So because of that the Government has to resort to the prior conviction, to show that he isn't that gilded lilly, credible as a credible person.

Thus, it becomes clear that while the Court spoke the proper words and apparently understood that the probative value referred to in

the rule is probative value on the issue of defendant's credibility. The court never-the-less believed that every past felony no matter what its value was probative of a defendants credibility because it showed him to be a 'felon-a criminal' and not a 'gilded lily'. This is tantamount to saying that every prior felony is admissible against a defendant to show he's a 'bad guy' a practice condemned by other courts.[2]

The Circuit Court of Appeals affirmed the lower court saying that the trial Court considered "the type of offense, the recent

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[2] Likewise, it is difficult to consider the prejudicial effect of any evidence in the abstract. Evidence is meant to be prejudicial in the broad sense. Our inquiry in this regard must also turn to a consideration of the tendency of the prior crimes evidence improperly to persuade the trier of fact on an issue. Thus, we must determine the tendency of the prior conviction evidence to persuade the jury that defendant probably committed the crime charged on trial or its tendency to persuade the jury that defendant was simply a "bad man" and probably deserved to be in jail.

United States v Martinez 55 F 2d 1273, 1977.

nature of the convictions and the centrality of the defendant's credibility as an issue in the case and then stated the lower court complied with Circuit Courts suggestion in United States v. Mahone, 537 F 2 d 922, 929 (7th Cr. 1976).

The Circuit Court completely ignored the fact that in the Mahone case it cited some of then Judge Burger's factors listed in Gordon v. U.S. 127 U.S. App. D.C. 343, 383 F 2d 936, 940 (1967). First and foremost of which it listed (1) The impeachment value of the prior crime. In its unpublished opinion affirming the trial court in the present case the court listed the three factors here considered by the trial judge none of which had to do with or took into consideration the the impeachment value of the prior crime. The reason for this omission is obvious. The impeachment value of the prior crimes was not considered by the trial court. He apparantly considered all prior felonies as probative of defendants credibility-Chief Justice Burger, then Judge Burger stated

in the Gordon case:

> "In considering how the District Court is to excercise this discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused is a "bad" person, but rather to show background facts which bear directly on whether jurors ought to believe him rather than other conflicting testimony. In common human experience acts of deceit, fraud, cheating or stealing, for example, are universally regarded as conduct which reflects adversely on a mans honesty and integrity. Acts of violence on the other hand which may result from a short temper, a combative nature, extreme provocation, or other causes generally have little or no direct bearing on honesty and veracity. A rule of thumb thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not."

Yet in this case the court admitted evidence of defendants prior conviction to show that he was not a 'gilded lily' in other words to show that he was a 'felon-a criminal' and therefore a bad guy.

III
DEFENDANT'S INCREASED SENTENCE

This Court in North Carolina v. Pearce (1969) 395 U.S. 711; 89A Ct. 2072, 23 L. Ed. 656,

set forth the following requirements that must be met by a judge who imposes a more severe sentence upon a defendant upon conviction in a retrial after remand:

1. That his reasons for giving the increased sentence must affirmatively appear.

2. That his reasons for so doing must be based on objective information.

3. That such objective information concerns indentifiable conduct on the part of the defendant.

4. That such conduct must have occurred after the original sentencing procedure.

5. That the factual data upon which the increased sentence is based must be made a part of the record.

Defendant has had four trials all for the same offense resulting in three sentences. Upon each retrial after remand, defendants sentence was increased. Upon his original conviction defendant was sentenced on a three count indictment to two years confinement plus 18 months probation. After his first remand and second trial defendant was sentenced on a two count indictment (the Court of

Appeals having dismissed one Count) to three years confinement plus three years probation. Upon defendant's fourth trial for the same offense, defendant's third trial having ended in a hung jury, defendant was sentenced to five years confinement plus five years probation.

In giving his reasons for increasing the sentence upon defendant fourth trial the court listed:

First: The recommending body here considered this to be a very vicious crime.[5]

It is obvious that such conduct did not occur after the original sentencing procedure.

Second: The victim of the fire didn't deserve that at all.[6]

Here again it is obvious that this conduct or fact was known to the original trial judge at the time of the original sentence.

Third: Perjury conviction of witness who

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5 Vol XII p. 1696, line three and four, Transcript of Record.

6 Vol. XII p. 1696, line six and seven, Transcript of Record.

testified on defendant's first trial and the fact that he talked to some one and implicated unnamed lawyer in the perjury.

Here it is obvious that this is not the act of defendant and even here this court admits that this was known to the judge who sentenced defendant the second time.

The court then said that defendant had been utterly disregardive of his obligations under the law while he had been under arrest.[7] This was an apparent reference to defendant having continued his Klan activities by attending out of state meetings while on bond. The trial court, however, said he did not rely upon this as reason for the increased sentence.[8] The court then talked about the defendants prior arrests in Michigan[9] a fact

7 Vol. XII, p. 1700, line 24, Transcript of Record
8 Vol. XII, p. 1700, line 19 and 20, Transcript of Record.
9 Vol. XII, p. 1701, line 5, Transcript of Record.

which has known to the original trial judge. Then he talked about the Cincinnati[10] conviction which had happened some 20 years prior to defendants original trial for this offense. The trial court next said:

> "He got on television here arrogant manner during the pendencey of these trials and in his robe answered questions to the press or media on television[11]... ""There was more than that to it. As I may remind you he referred to blacks as, he didn't mind the blacks, but on the other hand he didn't like to sleep with his dog, either".[12]

From all of this it can be seen that the trial judge in defendant's fourth trial, increased defendant's sentence because it was recommended by the Federal Bureau of Prisons by their study and recommendation was based upon the severity of the crime, a fact which was known to all of the three judges who presided over defendant's trial; because

10 Vol. XII, p. 1701, line 15 and 16, Transcript of Record.
11 Vol. XII p. 1703, line 12 Transcript of Record.
12 Vol. XII p. 1702, line 14, Transcript of Record.

he thought the victim of the crime did not deserve that kind of treatment; because Defendant continued his Klan activities while under arrest and because defendant was arrogant on television and insulted blacks. This Court should grant certiorari to review the judgment of the Circuit Court in order to consider the question as to what a court may consider under the holding of Pearce, as sufficient to justify an increased sentence. This Court should answer the question as to whether or not defendant's continuing Klan activities while on trial which while legal were abhorrent to the trial judge were sufficient to justify the giving of an increased sentence.

IV
GIVING OF AN AIDING AND ABETTING INSTRUCTION

In the instructions given by the Court at the close of all testimony, the Court gave what is commonly known as the "aider and abettor instruction", instructing the jury that it could find the defendant guilty if it found that he

aided and abetted the actual perpetration of the crime.[13] The giving of such instruction under the circumstances of this case was prejudicial error.

Here defendant-appellant faced no charge of aiding and abetting. He was tried on a two-count indictment. Count I for attempting to damage a building used in interstate commerce, and Count II for possession of an unregistered firearm.[14] The Government's case proceeded upon the assumption that defendant-appellant was the perpetrator of the crime. It presented no evidence of another perpetrator nor of defendant-appellant's aiding and abetting anyone else. In fact, nowhere in the case, in the indictment, in the Government's theory of the case, in the evidence presented, nor in any other manner, does there appear any mention of another person committing the crime

13 Transcript of Proceedings, Vol. VIII, p. 1211 and 1212; Instruction No. 25.
14 Transcript of Proceedings, Vol. VIII, p. 1171; Instruction No. 2.

or of defendant-appellant aiding and abetting another in form or in substance.

In affirming the lower court's giving of such instruction the Circuit Court of Appeals ignored the legal principal affirmed in many cases: and pointedly expressed in a case decided by and now relied upon by the Circuit Court in upholding the District Judge to the effect "that one cannot aid and abet in the commission of a crime unless there is another who commits the offense." In the present case the only reference to another person committing the crime was made by the attorney for the defendant in his closing argument as a suggestion to the jury that a striking employee would be more likely to have committed the crime than the defendant. Aside from this remark there is absolutely no reference in the trial to another person committing or participating in the commission of a crime. The Circuit Court was apparently of the opinion that because defendant's counsel made such a remark

to the jury the judge was justified in giving an aiding and abetting statute even though there was an entire lack of evidence as to anyone else being involved in the alleged offense in any manner. The Circuit Court in affirming the lower court said:

> "Indeed, appellant defended himself on the theory that someone else committed the crime and there was ample evidence to show that he had a connection with the alleged offense."

This simply says that because defendants counsel suggested to the jury that a striking employee may have committed the offense and because the evidence strongly implicated the defendant as the offender, the court could instruct the jury that it could find the defendant quilty because he may have helped a striking employee do it, even though there was absolutely no evidence to that point.

This court should grant certiorari to consider the question presented by the Circuit Court's holding as to whether or not in a case where the

defendant is charged as the sole and principal offender, where no evidence was presented of another actor, planner, conspirator or of any other person in any manner whatsoever being involved in the offense, where, the government's theory of the case was that the defendant was the sole offender, and the government presented the case on such theory, may the trial court charge the jury that it may find the defendant guilty as an aider and abettor merely because the evidence strongly indicates that defendant was the sole offender and defendants attorney suggests to the jury that someone other than defendant may have had a motive to commit the crime.

V

COURT'S REFUSAL TO ALLOW DEFENDANT'S OPENING STATEMENT

After the jury was impanelled and prior to commencement of evidence defendant-appellant's attorney requested the right to make defendant-appellant's opening statement at the close of the Government's case and prior to the beginning of

defendant-appellant's case. This request was denied by the Court with this statement:

> If you conduct an opening statement it must be done at this stage of the trial."

At the close of the Government's case and before commencing to put on defendant-appellant's evidence, counsel for defendant-appellant again requested permission to at that time make opening statement. Again the trial Court denied this request.

It is fundamental law that defendant has the right to present opening statement.[15] The question presented here is whether or not the defendant has a right to defer such opening statement until the close of the government's case. In Karikas v. United States, 111 U.S. App. D.C. 312, 316, 296 F 2d 434; 438 (1961) the United States Court

15 Hallinan v. U.S. 182 F 2d 880, 885 Cert. den. 341 U.S. 952;71 S. Ct. 1010; 95 L. Ed. 1375. Hampton v. U.S. 269 A 2d 441, 93 A. L. R. 2d 951.

of Appeals for the District of Columbia held that witholding of defendant's opening statement until the close of the government case was proper. While recognizing the witholding of defendant's opening statement until the close of the government as a 'good trial tactic', that holding is not authority on the matter of the right to defer opening statement for in that case permission to defer such statement was requested and granted. However, in Hampton v. United States 269 A 2d 441, 93 A. L. R. 2d 951 the court in consideration of the question of the right to withhold opening statement said:

> "Our conclusion is and we so hold that in a criminal case tried to jury the defendant has the right to make an opening statement and that the effective exercise of that right requires that he be allowed to withold making his opening statement until the close of the government's case."

That case recognized that not only was witholding defendants opening statement until the close of the government case ' a good trial tactic,' but that it was a right necessary to the effective

use of the opening statement. In reaching that court reasoned:

> "In many cases defense counsel may not know what evidence, if any, he will present until he has heard and evaluated the government's evidence. At that time he may decide to offer no evidence, resting his case upon the presumption of innocence of his client and the government's burden of proving guilt beyond a reasonable doubt. Whether defendant himself will take the stand may not be decided until the government's case is closed or even until after witnesses for the defense have testified. Should such a defendant be required to make his opening before the government puts on its case and should he make an opening outlining his defense and what he expects to prove, and then when the government rests decides to offer no testimony, a jury conceivably might conclude that his failure to offer any evidence was an admission of guilt, or at least draw an adverse inference from his failure to prove what he had said he would prove."

It would seem particulary necessary in a federal criminal case that defendant have the right to defer his opening statement until the close of the government's case. In a Federal Criminal case the defendant cannot obtain a list of the government witnesses prior to trial. Neither does the defendant obtain a copy of state-

ment made by witnesses against him until that witness takes the witness chair. Hence, to require a defendant to make an opening statement outlining his defense when he does not know for sure what witnesses will testify for the government or if such a government witness has made a statement involving the defendant. How then can a defendant outline his defense until these questions have been answered by the governments witnesses as they testify. For the reasons stated in the Hampton case and for the additional reasons stated here to deny a defendant the right to defer his opening statement until the close of the government deprives him of the effective use of a trial tool which he has the unqualified right to and is prejudicial to defendant.

There are cases which hold that there is no right to defer defendants opening statement until the close of the government case.[16]

16 U.S. v. Conti 361 F. 2d 153 (1966 2nd Cir.) reversed on other grounds 88 S. Ct. 899, 390 U.S. 204, 19 L. Ed. 2d 1035.

These cases hold that to require the defense counsel to choose between making their opening statement after the opening statement of the prosecutor and not making it as all is not prejudicial to defendant and within the discretion of the trial court. These case go on the theory that such a requirment is within the trial courts broad power to regulate the conduct, and timing of a trial.

Such rulings ignores the detrimental effect such requirement may make upon the defendant's effective use of the opening statement and give preference only to an arbitrary and capricious requirement.

These decisions give no reason how witholding defendant's opening statement until the close of the government can effect the orderliness of the trial or the timing of the trial. Indeed the orderliness of the trial as it comes to the jury could well be better if the government made opening statement and presented its evidence and the defense made its opening and then presented its evidence.

In no way would such proceedure effect the orderliness of the trial and an opening statement limited to 10 or 15 minutes requires the same 10 or 15 minutes whether it presented after the governments opening statement or after the government closes its evidence.

No true reason has been advanced nor does one exist as to why the defendant's opening statement should not be allowed at the close of the government evidence. To require the defendant's opening to be made after the government opens is purely arbitrary and capricious, void of sound reasoning and prejudicial to the defendant. As said in the Hampton case it deprives the defendant of the effective use of the opening statement.

This court should grant certiorari to review the question as to whether or not defendant in a federal criminal case should have the absolute right to withold opening statement until the close of the government's case.

VI
RETRIAL AFTER HUNG JURY AND DOUBLE JEOPARDY

The court should issue certiorari here to review the question of double jeopardy raised upon retrial after a mistrial caused by a hung jury.

After two trials and two remands defendant's third trial ended in a mistrial declared by the trial judge when the jury after being out some 50 hours was unable to reach a decision. Thereafter, defendantfiled a motion to dismiss the indictment against him on the grounds that to again put him on trial for the fourth time after the third trial had ended in a hung jury would be double jeopardy. This motion was overruled by the trial court and defendant was again, for the fourth time, put on trial by jury for the same offense.

Historically in American criminal justice, courts have upheld retrial after a mistrial declared because the jury was unable to agree.

These cases began with U.S. v. Perez 22 U.S. (9 Wheat) 201 (1824) in which the court upheld the right of the trial court to dismiss a jury that was unable to agree. Since that time courts have continued to uphold such retrials ... on the bases of Perez and state simply that a trial judge has the right and power to dismiss a jury which is unable to agree. While upholding the right of the trial judge to dismiss a hung jury, none of these case has made an indepth study of the effect of a jury being unable to agree.

Defendant does not dispute the right of the trial judge to dismiss a jury which has been unable to reach a verdict after a reasonable length of deliberation, however, defendant strongly maintains that such a dismissal should be considered as an acquital of the defendant and retrial should then be prohibited.

If the burden of proof is truly upon the prosecution, if the defendant is truly presumed innocent, then upon a trial, after the government has made its attempt to convince the jury that

the defendant is guilty and has failed to convince 12 jurors of defendant's guilt, the government has failed it burden and such failure should be an acquital of the defendant. If this court continues to hold that when the government has failed its burden and the jury hangs, the defendant may be tried over again, the fundamental principle that the defendant must prove nothing, the entire burden is on the state becomes mere words. To continue to so hold is to say that even if the jury is not conviced of defendants guilt, even if all 12 of the jury do not believe the defendant guilty beyond a reasonable doubt, the defendant is not acquited until and unless the jury is also convinced that he is not guilty. This then places a burden upon the defendant to convince all 12 jurors that he is not guilty and belies the principle that defendant is presumed innocent until proven guilty

beyond a reasonable doubt and need prove nothing as the entire burden is on the government.

Respectfully submitted,

Harold E. Hutson,
1322 Circle Tower
Indianapolis, Indiana 46204
Attorney for Petitioner

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 22, 1980

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior Judge*

UNITED STATES OF AMERICA. Plaintiff-Appellee,	)	On Petition for Rehearing and Suggestion that Rehearing be En Banc.
No. 79-1331 vs.	)	
WILLIAM M. CHANEY, Defendant-Appellant.	)	

ORDER

On consideration of the petition for rehearing and suggestion that rehearing be en banc filed in the above entitled cause by Defendant-Appellant William M. Chaney, no judge in active service has requested a vote thereon, and all of

* The Hon. William J. Campbell, Senior Judge of the United States District of Illinois, is sitting by designation.

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1979
(Argued September 27, 1979)

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the) United States Dis-) trict Court for
No. 79-1331, 79-1598 vs.	) the Southern Dis-) trict of Indiana,) Indianapolis Di-
WILLIAM M. CHANEY, Defendant-Appellant.	) vision.)
	No. Ip 76-CR-65, Cale J. Holder, Judge.

ORDER

Defendant-appellant William M. Chaney was charged, in one count of an indictment, with attempting to damage anddestroy by explosives a building used in interstate commerce in violation of 18 U.S.C. & 844(i), and one count of unlawful

* The Hon. William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

possession of an unregistered destructive device in violation of 26 U.S.C. & 5861(d). Appellant asserts various grounds for reversal of the judgment of conviction entered on the jury verdict. We are unpersuaded by the arguments advanced in support of these assertions and accordingly affirm the judgment appealed from for the reasons set forth below.

I

The trial judge gave an illustration of the concept of circumstantial evidence as part of his standard indoctrination of prospective jurors. Appellant complains that this illustration was prejudicial because the example placed undue emphasis on the reliability of circumstantial evidence in a trial in which most of the evidence adduced against the defendant was circumstantial.

We find the judge's conduct proper. The judge's example, that finding snow on the ground in the morning when there was none the night before is circumstantial evidence that it snowed during

the night, was a perfectly neutral illustration. Unlike Sunderland v. United States, 19 F. 2d 202 (8th Cir. 1927), upon which appellant relies, the example bore no resemblance to the case the jurors heard.

Appellant also contends that a myriad of the judge's statements intimidated and biased the jury. Appellant cites many remarks made to groups of veniremen ultimately excluded from jury service; only one juror on the panel heard any of the allegedly prejudicial remarks. Appellant did not object to any of the judge's comments, and he fails now to demonstrate any prejudice resulting from these remarks. United States v. Jackson, 542 F. 2d 403 (7th Cir. 1976). The judge's statements, which generally concerned the duties and responsibilities of jury service, were again part of his standard voir dire. While the judge was a bit rambling in his discourse, our examination of the record reveals no plain error. See United States v. Mavrick, 601 F. 2d 921, 927 (7th Cir.

1979).

II

Although the indictment charged appellant only as a principal, the jury was properly charged that he might be found guilty as an aider and abettor. It is well settled that a defendant indicted solely for the commission of a substantive offense may be charged and convicted as an aider and abettor. United States v. McCambridge, 551 F. 2d 865, 871 (1st Cir. 1977). Indeed, appellant defended himself on the theory that someone else committed the crime, and there was ample evidence to show that he had a connection with the alleged offense. United States v. Doughty, 460 F. 2d 1360 (7th Cir. 1972).

III

The trial court denied defendant's cousel permission to make his opening statement at the close of the Government's case, ruling that counsel should make his statement after the Government's opening statement at that time, and now argues

that the judge's ruling was error.

A judge retains control over the order and format of opening statements. United States v. Freeman, 514 F2d 1184 (10th Cir. 1975). Appellant fails to demonstrate that he was prejudiced by the court's ruling, and cites no authority holding such a ruling reversible error. Appellant's counsel admitted at oral argument before this Court that he was prepared to state his theory of the case in advance of trial, and did not indicate that his theory changed after the presentation of the Government's case. We find the district court ruling was well within the court's discretion.

Appellant's defense rested in great part on his own testimony. The Government introduced two prior convictions into evidence pursuant to Rule 609(a) (1) of the Federal Rules of Evidence for the purpose if impeachment, and defendant objected to the admissibility of that evidence. The trial court conducted a hearing on the record and expressly found that the probative value of

evidence of his prior convictions outweighed any prejudicial effect. His ruling was not, as appellant claims, a "bare pronouncement of the required words." Rather, the record reflects the court's consideration of the type of offense, the recent nature of the convictions, and the centrality of the defendant's credibility as an issue in the case. Thus, the judge complied with our suggestions in United States v. Mahone, 537 F. 2d 922, 929 (7th Cir. 1976), and we therefore conclude that the convictions were properly admitted as evidence.

We have examined the appellant's other contentions of error and find them to be without merit. The judgment of conviction appealed from is affirmed, and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED

APPENDIX C.

PART OF THE DISTRICT COURT'S
RULING ON ADMISSIBILITY OF
DEFENDANTS PRIOR CONVICTIONS

Volume VI page 824 line 12
to page 825 line 7

MR. GOODLOE: Your Honor, the charges were criminal number 3248, Michigan Statutes Annotated 28.421, Possession of a Gas-Ejecting device, five years or $2,500 or both. Criminal number 3249, Carrying a Concealed Weapon in a Motor Vehicle, Michigan Statute Annotated 28.424, five years $2,500 or both.

THE COURT: Well now, did you find out whether that law was in force at the time of the commission of the crime?

MR. GOODLOE: This was read from the record in the Washtenaw County prosecutors office, your Honor.

THE COURT: That helps me a great deal with confidence. All right.

How the Court would find that that is probative evidence of the credibility of the witness,

and is admissible--that is, the two crimes referred to in the motion here, possession of a gas-ejecting device in the Michigan Circuit Court on March 10, 1972 judgment, and possession of a concealed weapon in the Michigan Circuit Court previously referred to, a judgment dated March 10, 1972.

Volume VI page 826 line 5
through line 19

MR. HUTSON: Well, what probative value does this have to the--

THE COURT: Credibility of this witness. He's a prior convicted felon, a criminal.

MR. HUTSON: What probative value does that have to his credibility, when the conviction has nothing to do with the credibility? When the conviction is not for anything like perjury or doing something that--

THE COURT: Well, that would be another grounds of admissibility, if it was for some other purpose, your understand.

MR. HUTSON: Yes.

THE COURT: That isn't the purpose. This is one where he is a prior-convicted felon, and says it's admissible.

Volume VI page 831 line 3
through line 16

The Court further finds that the probative value of the evidence and value to the trier of the fact is greater than that of any prejudice that might result to the defendant from such being ellicited in the record by cross-examination of the defendant. The defendant has taken a steadfast position that he's an honorable man, truthful and honest, and went into great detail of all of the achievements in life, all of the organizations he belongs to. He's built up his credibility to such an extent that it seems a shame that anybody would ever want to accuse him of being incredible about his testimony. So because of that the Government has to resort to the prior conviction, to show that he isn't that

gilded lilly, credible as a credible person.

APPENDIX D.

PART OF TRIAL COURT'S ORDER
SENTENCING DEFENDANT

Volume XII page 1687 line 24
to page 1690 line 20

THE COURT: All right, sir. Your family should have a recording of that for the rest of their lives.

You may step aside.

Anything further now, Counsel for the defendant?

MR. HUTSON: I think I have only got one thing I want to say, and that is as I said it up there, most of the defendant's trouble has come while he was in the Klan. He has told me unofficially--don't know whether he would tell the Court this--that when his present term ends in June he intends to get completely out of the Klan at that time, have no more to do with it. I don't know whether he is prepared to say that to the Court or not, but unofficially that's what he's told me. I felt the Court ought to consider that.

THE COURT: Counsel, do you have any legal

reason to give, why sentence shouldn't be pronounced tonight?

MR. HUTSON: None.

THE COURT: All right, let the record show that on this 25th day of May 1979 came the attorney for the Government, and the defendant appeared in person and with his privately-employed counsel, Mr. Harold Hutson.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of attempted fire bombing of a building, in violation of Title 18 United States Code Section 844 (i), as charged in Count I, and possession of an unregistered destructive device in violation of Title 26 United States Code Section 5861 (d), as charged in Count II in the indictment.

And the Court having asked the defendant whether he has anything to say, why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted of the two offenses in the indictment, as previously found on March 23, 1979 based on the verdicts--a verdict of the jury.

IT IS ADJUDGED that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years on Count I, and for the period of five years on Count II. The Court directs that the defendant be released on probation, and the sentence on Count II be suspended, probation to commence following his execution of the sentence on Count I. The sentence on Count II obviously follows the provisions of Title 26 United States Code Section 5871, which provides that the defendant shall become eligible for parole as the Board of Parole shall determine on that offense. However, placing him on probation, if he violates probation that provision for parole on Count II would be in effect.

The provisions of the parole--I mean the

probation are that it appearing to the Court that the best interests of the public as well as the defendant will be served thereby, IT IS ADJUDGED that the execution of the sentence on Count II of imprisonment for five years be suspended, and the defendant is placed on probation, to commence after the expiration of his sentence, execution of his sentence in the judgment on Count I, and such probation to be under the supervision of the Probation Service of the Court for the period of five years. And such probation is to run concurrent with the parole if the defendant is paroled on the judgment in Count I. They are to run concurrent.

IT IS FURTHER ORDERED that during the period of that probation the defendant shall conduct himself as a lawabiding, industrious citizen, and observe such conditions of probation as the Probation Service may prescribe; otherwise the defendant may be required to serve the sentence of imprisonment assessed in Count II, in the judgment on Count II of the indictment.

Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1289

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM M. CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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Washington, D.C. 20530

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WILLIAM M. CHANEY, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1979. A petition for rehearing was denied on January 22, 1980. The petition for a writ of certiorari was filed on February 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could be tried for a fourth time after two prior trials resulting in convictions were reversed on appeal and a third trial ended in a hung jury.

2. Whether petitioner was improperly sentenced on retrial to a longer sentence than imposed for earlier convictions that had been reversed.

3. Whether the trial court erred in instructing the jury regarding aiding and abetting when petitioner had not been indicted as an aider and abettor.

4. Whether petitioner's conviction should be reversed because he was not allowed to defer his opening statement until the close of the government's case.

5. Whether the trial court erred in admitting two prior state felony convictions to impeach petitioner's credibility.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted of attempting to damage by explosives a building used in interstate commerce, in violation of 18 U.S.C. 844(i), and of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d). He was sentenced to five years' imprisonment on the first count to be followed by five years' probation on the second count. The court of appeals affirmed (Pet. App. A3-A8).

The evidence at trial established that in the early morning of May 11, 1976, two truck drivers saw petitioner's automobile enter the driveway of the Naegele Outdoor Advertising Company building in Indianapolis, Indiana (Tr. 449, 472). Petitioner left the car and threw a fire bomb against the rear door of the building (Tr. 472-475). A local police officer saw petitioner driving away from the scene of the fire and arrested him one block away from the building (Tr. 108-122, 208-216).

The trial below marked the fourth time petitioner has gone to trial on these charges. He was first tried and convicted in October 1976. The court of appeals reversed that conviction on the basis of an improper instruction to the jury. 559 F. 2d 1094 (1977). Petitioner was retried in November 1977 and was again convicted. This conviction was also reversed, this time on the ground that the trial court had erred in excluding certain defense evidence. 577 F. 2d 433 (1978). Petitioner's third trial ended in the declaration of a mistrial, upon petitioner's motion, after the jury was unable to reach a verdict.

ARGUMENT

1. Petitioner contends that his conviction after three previous trials is barred on both double jeopardy and due process grounds (Pet. 12-16, 37-40).

Petitioner concedes (Pet. 12) that the Double Jeopardy Clause does not prohibit a retrial after a conviction has been reversed on appeal. See *United States* v. *Ball*, 163 U.S. 662, 672 (1896). He contends (Pet. 37-40), however, that where a mistrial is declared because of the jury's inability to agree on a verdict, as in petitioner's third trial, the Double Jeopardy Clause prohibits a retrial. This contention is completely without foundation. Since *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), it has been established that a defendant may be reprosecuted if his first trial ends in a mistrial. Moreover, petitioner himself moved for the mistrial here on the basis of the jury deadlock and thus is in no position to complain that he has been denied his right to have his guilt or innocence determined before the trier of fact in the proceeding resulting in a mistrial. See *United States* v. *Dinitz*, 424 U.S. 600, 607-608 (1976).

Petitioner also contends (Pet. 12-16) that to try him for a fourth time, whatever the reasons for the inconclusive results of the first three trials, violates the Due Process Clause. This contention is without merit. Cf. *United States* v. *Dooling*, 406 F. 2d 192 (2d Cir.), cert. denied, 395 U.S. 911 (1969). Petitioner was convicted only on the charges initially brought against him, on which he had been convicted twice before. That conviction does not violate due process just as it does not violate double jeopardy. The retrial is permitted, not because of a "technicality" (Pet. 14), but because letting petitioner go free without a determination of his innocence would offend important societal interests without significantly advancing the policies of due process and double jeopardy. As the court stated in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

In the present case, there were good reasons why each of the first three trials ended without a final judgment. Petitioner points to no special unfairness or governmental misconduct that necessitated four trials of the charges against him. The interests of justice dictated that each trial be held for the purpose of resolving those charges, and the circumstances of the case provide no basis for a contention that petitioner was the victim of fundamentally unfair procedures denying him due process.

2. Petitioner also contends (Pet. 21-26) that the trial judge's imposition of a sentence longer than that imposed on his earlier convictions violated the due process standards of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).[1]

In *Pearce* this Court established that the Double Jeopardy Clause does not bar the imposition of a higher sentence on retrial. Due process would be violated, however, if the higher sentence were imposed for vindictive or retaliatory reasons. The Court concluded that a greater sentence may be imposed "in light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' " *Id.* at 723, quoting *Williams* v. *New York*, 337 U.S. 241, 245 (1949). But in order to assure the absence of improper motivation, the trial judge must place upon the record his reasons for

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[1]As previously set forth, petitioner now stands sentenced by the district court to a term of five years' imprisonment and five years' probation. This constitutes an increase in severity from both the sentence imposed after petitioner's first trial (two years' imprisonment and 18 months' probation) and the sentence imposed after his second trial (three years' imprisonment and three years' probation) (Pet. 4). Each sentence was imposed by a different district judge.

imposing the increased sentence, and those reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726.

The trial judge in this case complied fully with the mandate of *Pearce*. He made extensive findings (Tr. 1691-1704) in explanation of the sentence and in justification of its increased severity. Petitioner had repeatedly disregarded the conditions imposed by the magistrate regarding his release on bond (Tr. 1700, 1703-1704). Petitioner had been granted the privilege of leaving the district for purposes of employment if he obtained the permission of the magistrate (Tr. 1673-1674; Disp. Tr. 13-19, 86-87).[2] However, petitioner frequently left the state for various other reasons without notifying the magistrate, including to attend and preside at Ku Klux Klan rallies (Disp. Tr. 86-88, 94). As the trial judge noted, this conduct was undertaken despite petitioner's knowledge of the "violence [that] has followed the organization" (Tr. 1703). The trial judge concluded that petitioner's actions after his prior sentencings demonstrated that he "has a disrespect for the law" (Tr. 1704). These findings satisfied the requirement of *North Carolina* v. *Pearce*, *supra*, and petitioner's violations of the conditions of his bond justified the increased sentence imposed upon him.[3]

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[2]"Disp. Tr." refers to the transcript of the initial disposition hearing held on March 23, 1979.

[3]Petitioner claims (Pet. 24) that the trial court did not rely on his violations of bond conditions as a reason for the increased sentence, citing the trial judge's statement that "I won't rely upon this for my judgment in increasing the penalty." This citation is taken out of context and misrepresents the meaning of the court's comment. Read in context, it is clear that the court relied principally on petitioner's conduct on bail to justify the increased sentence, but planned to substitute written findings for his oral findings in that regard. The court stated (Tr. 1700):

> The record now discloses, which the Court observed in informal findings which this amounts to—and I won't rely upon this for my judgment in increasing the penalty and adopting the five-year recommendation; it will be reduced to writing so that it will have the flesh on the bones of an explanation of such finding, of increasing the penalty—that the defendant had been utterly disregardive of his obligations under the law while he's under arrest.

In fact, the court did not subsequently supplant its oral findings with a formal written order.

3. Petitioner also contends (Pet. 26-30) that, because he was not specifically indicted as an aider and abettor, the trial court erred in instructing the jury that it could find him guilty if he aided and abetted the offense charged. This contention is without merit. It is well established that a defendant may be convicted as an aider and abettor even if not designated as such in the indictment. See *United States* v. *McCambridge*, 551 F. 2d 865, 871 (1st Cir. 1977), and cases cited therein. Indeed, as the court of appeals noted, the instruction was particularly appropriate here because petitioner had "defended himself on the theory that someone else committed the crime, and there was ample evidence to show that [petitioner] had a connection with the alleged offense" (Pet. App. A6).

4. Petitioner's argument (Pet. 30-36) that his conviction should be reversed because he was not allowed to defer his opening statement until the close of the government's case is similarly insubstantial. The order and format of opening statements is a matter largely within the discretion of the trial court. See *United States* v. *Freeman*, 514 F. 2d 1184, 1192 (10th Cir. 1975); *United States* v. *Conti*, 361 F. 2d 153, 158 (2d Cir. 1966), vacated

on other grounds, 390 U.S. 204 (1968). There is no evidence that that discretion was abused. Indeed, petitioner has not suggested how he was prejudiced by the trial court's ruling.[4] It was established that petitioner's counsel was prepared to state his theory of the case in advance of trial, and that theory was not altered after the presentation of the government's case (Pet. App. A7).

5. Finally, petitioner asserts (Pet. 16-21) that the trial court erred in allowing his trial testimony to be impeached by the introduction of two prior state felony convictions, for possession of a gas ejecting device and for carrying a concealed weapon.

This contention is without merit. Rule 609(a)(1) of the Federal Rules of Evidence specifically allows the use of prior felony convictions for impeachment of a witness if the court determines that their probative value outweighs their prejudicial effect. Such convictions need not involve dishonesty or false statements, which are the subject of Rule 609(a)(2). When the government sought to cross-examine petitioner at trial with regard to prior convictions, the court held a hearing and determined on the record that the standard for admission under Rule 609(a)(1) had been met as to these two convictions (Tr. 807-812, 823-832). The trial court focused on the fact that petitioner's defense rested in great part on his own testimony and that he had sought to build up his own credibility by detailing his "achievements in life" and his standing in the community as a honorable man (Tr. 831, Pet. App. A11). In light of this approach, the court

[4]Cf. *Hampton* v. *United States*, 269 A.2d 441 (D.C. 1970), cited by petitioner (Pet. 32-33), where the court held that the defendant's inability to make an opening statement did not prejudice him and affirmed his conviction.

expressly ruled that the probative value of the prior convictions outweighed their prejudicial effect. The court of appeals correctly held (Pet. App. A7-A8) that the district court properly exercised its discretion, and there is no occasion for further review of this fact-specific determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

PHILIP B. HEYMANN
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WILLIAM C. BROWN
Attorney

MAY 1980

DOJ-1980-05